IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0655

STATE OF MONTANA,

Plaintiff and Appellee,

v.

WAYNE PERCY LINDSEY,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable James A. Haynes, Presiding

APPEARANCES:

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STATEMENT OF THE ISSUES

1. Did the district court violate Appellant's due process rights when it failed to have a transfer back hearing within thirty days of granting leave to file the information?

2. Did the district court err when it denied Appellant's motion to withdraw his guilty plea?

3. Did the district court abuse its discretion when it failed to inquire about Appellant's request for new counsel?

4. Did Appellant's first trial attorney provide ineffective assistance of counsel?

STATEMENT OF THE CASE

Wayne Percy Lindsey (Lindsey) was charged with Sexual Intercourse Without Consent and Sexual Assault for acts that occurred in 2005-2006, when he was 16 and 17 years old. The district court granted leave to file the information on December 5, 2007. The prosecutor filed the information the same day. (D.C. Docs. 1-3.)

On December 4, 2008, at a pre-trial hearing, the district court informed the parties that a transfer back hearing had not been held and asked Lindsey if he waived the hearing. (12/4/08 Tr. at 2.) Lindsey did not waive and requested a continuance in order to obtain an evaluation. (D.C. Docs. 72-73.) The transfer

back hearing was held March 16, 2009. (D.C. Doc. 104.) Lindsey entered a plea agreement and changed his plea on March 24, 2009. (D.C. Docs. 118-20.) Shortly thereafter Lindsey obtained new counsel and motioned to withdraw his guilty plea. (D.C. Docs. 134, 141-42.) After a hearing, Lindsey's motion was denied. (7/7/09 Tr.; D.C. Docs. 150, 159.) Lindsey was sentenced and filed a timely appeal. (D.C. Doc. 170, attached as Appendix A; D.C. Doc. 174.)

STATEMENT OF THE FACTS

Lindsey was born . By age nine it was apparent Wayne Percy Lindsey's life was going to be anything but easy. His father was in and out of prison and his mother abandoned him. Lindsey did not have a supportive environment to grow up in and was shuffled from home to home of relatives. Eventually, Lindsey was taken in by his Uncle Jim and Aunt Kristen. Lindsey lived with his aunt and uncle several times over several years and was used as a babysitter for their children, including their daughter R.M. Lindsey was often taken out of school in order to babysit his cousins and never completed the ninth grade. Lindsey was diagnosed with ADD/ADHD and had an IEP through the schools which tested him at a third grade reading level and 5th grade comprehension. (3/16/09 Tr. at 35:22-36:1, 37:14-18, 61; 12/1/09 Tr. at 84, 92, 102:15-17.)

When Lindsey was fifteen years old, Aunt Kirsten (only nine years his senior) often confided in Lindsey about the sad state of her life and her ongoing extramarital affairs with other men. (D.C. Doc. 140 at 5.) One of these "affairs" included Lindsey himself. Aunt Kristen was the first person Lindsey had sex with and ultimately he was a victim of sexual abuse by Aunt Kirsten.[1] (D.C. Doc. 140 at 5; 12/1/09 Tr. at 19.)

Lindsey was arrested on December 4, 2007, and charged with Sexual Intercourse Without Consent and Sexual Assault on R.M. for alleged acts which occurred in 2005-2006.

On December 4, 2008, at a pre-trial conference, the district court raised the issue that the required transfer back hearing had not been held and asked Lindsey whether he waived this hearing. (12/4/08 Tr. at 2.) Lindsey did not waive the hearing and further requested a continuance to get an evaluation to provide testimony for the transfer back hearing. (D.C. Docs. 72-73.) The transfer back hearing was held March 16, 2009, with testimony from Dr. Stratford on Lindsey's evaluation and ability to receive treatment in the community. Although called a "mixed bag" the expert testified that with the level of anxiety shown by Lindsey he

[1] The record is devoid as to why the State did not charge Aunt Kristen with Sexual Intercourse Without Consent against Lindsey.

would be "accessible to change," Lindsey was not anti-social, and he was not a risk to the community with a tight structural program. (3/16/09 Tr. at 57-58, 76.)

Eight days later, with the transfer issue still pending, Lindsey entered a plea agreement on March 24, 2009, pleading guilty to sexual assault. At the Change of Plea hearing, the Court asked what the status of the transfer back issue was and Lindsey's counsel responded that it was still ripe. (3/24/09 Tr. at 3.) The State interjected and stated that if the transfer hearing was still an issue, the plea agreement would be taken back. (3/24/09 Tr. at 3.) After a brief consultation with his attorney, Lindsey then waived the transfer back proceeding and pled guilty. (3/24/09 Tr. at 3-4.)

After his change of plea but before sentencing, Lindsey retained private counsel who promptly motioned to withdraw the guilty plea. The district court denied withdrawal of the guilty plea and Lindsey was sentenced. (D.C. Doc. 159.) Lindsey appeals.

Additional facts are provided below where relevant.

SUMMARY OF THE ARGUMENT

Lindsey's due process rights were violated when a transfer back hearing, required to be held within thirty days of the district court granting leave to file the information (Mont. Code Ann. § 41-5-206(3)), was not even discussed until one year later. He was prejudiced as holding a timely hearing would have provided the

opportunity to participate in the rehabilitative services of the youth court, which was designed specifically for this purpose.

Although Lindsey made a timely motion, the district court erred when it denied Lindsey's motion to withdraw his guilty plea as Lindsey was not aware of the direct consequences of his plea as his counsel had misrepresented the sentence he would receive; there was no benefit of the bargain; and the district court's colloquy at the change of plea hearing was completely inadequate. *State v. Usrey*, 2009 MT 227, 351 Mont. 341, 212 P.3d 279.

The district court abused its discretion when it failed to make *any inquiry* or provide an *informed decision* regarding Lindsey's request for new counsel. *State v. Hendershot*, 2007 MT 49, 336 Mont. 164, 153 P.3d 619; *United States v. Smith*, 282 F.3d 758 (9th Cir. Wash. 2002).

Finally, Lindsey's counsel, Carol Johns, failed to provide record-based effective assistance of counsel. Johns was ignorant of Youth Court Act law and there was no plausible reason she should not have motioned to dismiss after the time limit ran for the transfer back hearing. If the motion was denied, the court would have been apprised of its duty to hold a hearing a year prior to when the issue finally came to light.

STANDARD OF REVIEW

For the Court's convenience, the standard of review for each issue has been placed in its corresponding argument.

Even if the parties get it wrong, this Court has the constitutional obligation to determine the correct standard of review. This Court is not bound by the standard of review cited by the parties. *See State v. Shively*, 2009 MT 252, ¶ 13, 351 Mont. 513, 216 P.3d 732; *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506, 1519 n. 24 (5th Cir. 1994). The correct standard of review *cannot* be waived, and if neither party suggests the appropriate standard this Court must determine the proper standard on its own. *See United States v. Vontsteen*, 950 F.2d 1086, 1091-92 (5th Cir. 1992) (en banc) *cert denied, Vontsteen v. United States*, 505 U.S. 1223 (5th Cir. 1992); *Worth v. Tyer*, 276 F.3d 249, 262 n.4 (7th Cir. 2001); *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1022 n.4 (9th Cir. 1997) (en banc); *K&T Enters, Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 175 (6th Cir. 1996) (The standard of review is a determination that "remains for this court to make for itself.").

ARGUMENT

I. LINDSEY WAS DENIED HIS RIGHT TO DUE PROCESS AS THE DISTRICT COURT DID NOT EVEN RAISE THE TRANSFER BACK HEARING FOR 364 DAYS *AFTER* THE DISTRICT COURT GRANTED LEAVE TO FILE THE INFORMATION, WELL AFTER THE 30 DAYS STATUTORILY REQUIRED.

A. Plain Error Review is Appropriate.

This Court generally does not review on appeal issues that were not raised before the district court. However, it will "undertake review of such an issue under the plain error doctrine in situations that implicate a defendant's fundamental constitutional rights when failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *State v. Hayden*, 2008 MT 274, ¶ 17, 345 Mont. 252, 190 P.3d 1091; *State v. Finley*, 276 Mont. 126, 915 P.2d 208 (1996). The initial question to be answered by this Court is whether the alleged error is plain and leaves this Court "firmly convinced" that some aspect of the proceeding, if not addressed, would result in a manifest miscarriage of justice, call into question the fairness of the proceeding, or compromise the integrity of the judicial process. *State v. Taylor*, 2010 MT 94, ¶ 17, 356 Mont. 167, 231 P.3d 79. *See also, Taylor*, ¶ 33 (J. Nelson, concurring). The decision to invoke plain error review is a discretionary one that is to be used sparingly on a case-by-case basis. *Hayden*, ¶ 17.

Plain error review is appropriate here because Lindsey's fundamental right to due process has been violated. Further the error is plain. The district court was required to hold a transfer back hearing within thirty days of granting leave to file the information. The district court failed to do so. This resulted in a violation of Lindsey's due process rights and a failure to review this issue would result in a manifest miscarriage of justice as Lindsey's due process rights would continue to be trampled upon. A failure to resolve this question also places the judicial process and its integrity, as an unbiased party, at stake and would blatantly ignore the checks and balances our system of government is based upon. The record here establishes that a hearing required to be held within thirty days of granting leave to file the information was not raised until one year later. This is a violation of serious consequences and "is one of those rare instances in which plain error review is appropriate." *State v. West*, 2008 MT 338, ¶ 30, 346 Mont. 244, 194 P.3d 683.

B. Statutory Law Requires a Transfer Back Hearing to be Held Within 30 Days of Granting Leave to File the Information.

Montana Code Annotated § 41-5-206(3) provides,

> The district court shall grant leave to file the information if it appears from the affidavit or other evidence supplied by the county attorney that there is probable cause to believe that the youth has committed the alleged offense. ***Within 30 days after leave to file the information is granted, the district court shall conduct a hearing*** to determine whether the matter must be transferred back to the youth

> court, unless the hearing is waived by the youth or by the youth's counsel in writing or on the record. The hearing may be continued on request of either party for good cause.

Mont. Code Ann. § 41-5-206(3) (emphasis added).

The plain language of the statute requires a transfer back hearing to be held within 30 days after leave to file the information is granted. A youth may waive the hearing if done so within that 30 days, if the youth has not waived within the 30 days and a hearing has not been held, his due process rights have been violated. Mont. Code Ann. § 41-5-206(3).

The statute cited above has not always taken this form. Prior to a 1999 Amendment to bring it to its current form, the statute never required a hearing whether the juvenile should be in youth court. This Court determined failure to hold a hearing violated due process law. *State v. Butler*, 1999 MT 70, ¶ 32, 294 Mont. 17, 977 P.2d 1000 (*citing Kent v. United States*, 383 U.S. 541, 557 (1966), *overruled by State v. McKee*, 2006 MT 5, 330 Mont. 249, 127 P.3d 445, referencing the enactment of Mont. Code Ann. § 41-5-206(3) (1999).

In response to challenges to the constitutionality of the statute, the Montana Legislature modified § 41-5-206 in 1999 to include the provision that required the district court to hold a hearing within thirty days after leave to file the information is granted to determine whether the case should be transferred back to Youth Court. Mont. Code Ann. § 41-5-206(3); *see also*, *McKee*, ¶ 20.

Importantly, the hearing in § 41-5-206(3) is automatic and is not brought to the Court upon motion of the defendant. Further, the hearing is not just statutorily mandated; it is constitutionally required for the protection of due process rights. *See Kent*, 383 U.S. at 557; *Butler*, ¶ 16; Mont. Const. art II, §§ 15, 17; U.S. Const., amend. XIV.

Unlike other statutory provisions which provide procedural due process within a varied or reasonable amount of time,[2] the Legislature crafted a specific time frame for the transfer back hearing to be held: 30 days from granting leave to file the information. Mont. Code Ann. § 41-5-206(3). This directive is mandatory and time sensitive (i.e. "time is of the essence").

The transfer back hearing was raised here for the first time ***364 days after*** the district court granted leave to file the information. (D.C. Docs. 2, 66; 12/4/2008 Tr. at 2, attached as App. B.) At that time, Lindsey did not waive the hearing and, in fact, soon thereafter requested a continuance in order to secure an evaluation of Lindsey for purposes of the hearing. (D.C. Docs. 72-73.) Just as in *Butler* where this Court stated it was "as potentially important to a youth as the

[2] *See e.g.*, Mont. Code Ann. § 46-11-205 (court may allow an information to be amended in matters of substance at any time, but not less than 5 days before trial), § 46-13-108 (notice must be given at or before omnibus hearing), § 46-13-110 (omnibus hearing must be held within a reasonable time following the entry of a not guilty plea but not less than 30 days before trial), § 46-18-203(4) (without unnecessary delay, the offender must be brought before the judge).

difference between being detained until he is 25 years of age if the case is processed in youth court, and losing his life if the case is processed in district court[,]" *Butler*, ¶ 26. Lindsey argues that failure to follow the legislative requirement of holding the transfer-back hearing within 30 days, denied him his right to due process. Procedure was not followed.

Raising the issue of the transfer back hearing 364 days after the district court granted leave to file the information is not acceptable and did not provide due process protection to Lindsey who was a youth at the time the alleged crime was committed.

> The traditional aim of the juvenile justice system . . . has sought to discard the rigidities, technicalities, and harshness of the criminal justice system and replace it with treatment and rehabilitation. The juvenile justice system was "rooted in social welfare philosophy rather than in the corpus juris." Juvenile courts have historically centered on guiding and rehabilitating children for the betterment of themselves and society as a whole.

Mendez-Alcaraz v. Gonzales, 464 F.3d 842, 848-49 (9th Cir. Or. 2006) (CJ. Ferguson, dissenting), *citing In re Gault*, 387 U.S. 1, 15-16 (1967) *and Kent*, 383 U.S. at 554-55).

By failing to hold the transfer back hearing within the required 30 days, Lindsey was prejudiced and denied the ability to make an effective argument a year earlier for the reasons to stay in Youth Court. A year earlier would have provided more time for rehabilitation at a youth level and with great probability would have prevented the subsequent violations of bail for this charge. Lindsey had the support of the community, not only through the Clark family who has known Lindsey since he was a child and became an unofficial foster family for him throughout this case, but of several people who testified on his behalf at his sentencing. (D.C. Doc. 167; 12/1/09 Tr. at 51-57, Where over fifteen members of the community testified to support Lindsey's release to the community.) Throughout this case, Lindsey was offered employment and support for continuing his education. (2/7/08 Tr. at 4; 7/24/08 Tr.) Treatment in a community setting was possible. (3/16/09 Tr. 57-77.) Although the offense charged was sexual in nature, Lindsey had no previous sexually deviant behavior or committed acts against other children. The best interest of Lindsey would have been to proceed in youth court because if he successfully completed treatment he would not have to register as a sex offender for life. Denying Lindsey that year denied him the window of opportunity for the rehabilitation purposes of the Youth Court Act to take hold.

"Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law." *In re Gault*, 387

U.S. at 13. If this Court determines Lindsey's due process rights were not violated because the transfer back issue and hearing was raised and held over one year later, then this Court has allowed Lindsey to stand condemned by a method which "flouts" the constitutional requirement of due process of law and the Court has shown clear disregard to a legislative mandate and will blur the separation of powers. *In re Gault*, 387 U.S. at 13.

> Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. . . . The history of American freedom is, in no small measure, the history of procedure. . . . Procedure is to law what 'scientific method' is to science.

In re Gault, 387 U.S. at 20-21 (internal quotations and citations omitted.) This Court has no other viable option but to declare Lindsey's right to due process was violated.

C. Lindsey Did Not Provide an Effective Waiver of the Transfer Back Hearing.

The State may argue Lindsey waived the transfer back proceeding, as he stated at the Change of Plea Hearing after the State threatened to take the plea agreement off the table. (3/24/09 Tr. at 2, 4, attached as App. C.) However, this waiver is ineffective for two reasons.

1. Waiver Did Not Occur Within the Statutorily Defined 30 Days.

First, statutorily, Lindsey could only have waived his right to a transfer back hearing within 30 days of the district court's grant for leave to file the information and not have violated his right to due process. Lindsey cannot waive a hearing where the time frame to do so has already expired and his right to due process had already been violated.

The State has previously acknowledged, and this Court has noted that "all judicial proceedings must be clothed in the raiment of due process . . . . [and] the judge must cast about the defendant all of the trappings of due process." *Butler*, ¶ 27 (*citing State v. Angel C.*, 715 A.2d 652, 666 (Conn. 1998)). Plain and simple: The district court failed to shower upon Lindsey his due process right to a transfer back hearing within 30 days of granting leave to file the information. To turn on this stance and argue Lindsey made an effective waiver of his right to a hearing, when that waiver must be made within the statutorily required 30 days of granting leave to file the information, would be preposterous and disingenuous.

2. In Obtaining a Waiver, the State Breached the Plea Agreement.

Secondly, Lindsey's waiver of the transfer back hearing is ineffective because the "waiver" was only given *after* the prosecutor *threatened* to take the *signed* plea agreement off the table if the issue was still pending. In doing so, the

prosecutor breached the plea agreement by inserting terms which were not agreed to and to which Lindsey was coerced into taking.

A plea agreement is a contract between the State and the defendant, and is subject to contract law standards. *State v. Hill*, 2009 MT 134, ¶ 49, 350 Mont. 296, 207 P.3d 307 (J. Cotter, concurring, *citing State v. Rardon*, 2002 MT 345, ¶ 18, 313 Mont. 321, 61 P.3d 132). Prosecutors, as well as defendants, are bound by the plea agreements they make. Prosecutors who engage in plea bargaining must meet strict and meticulous standards of both promise and performance. *Hill*, ¶ 29 (*citing State v. Rardon*, 1999 MT 220, ¶ 14, 296 Mont. 19, 986 P.2d 424, *overruled on other grounds*, *State v. Munoz*, 2001 MT 85, 305 Mont. 139, 23 P.3d 922).

Removing the transfer back issue from the district court's consideration was not part of the agreement put in writing and there was no oral amendment to the plea agreement agreed upon by the parties. (3/24/09 Tr. at 3.) Therefore when the court raised the issue to the parties at the change of plea hearing, and Lindsey's counsel stated the issue was still ripe for decision, the prosecutor's threat to take back the plea agreement constituted a breach.

D. Violation of Lindsey's Due Process Rights Requires Dismissal With Prejudice of the Charges Against Him.

The United States Supreme Court has held that due process requires the court to hold a hearing. *Kent*, 383 U.S. at 557. The Montana Legislature honored that requirement by determining due process would be satisfied when a hearing

was held within 30 days of the district court granting leave to file the information. Mont. Code Ann. § 41-5-206(3). In this case, the district court did not hold the required transfer back hearing within 30 days of granting leave to file an information, nor did Lindsey effectively waive his right to a transfer back hearing. This failure violated his due process rights under the Montana and United States Constitutions.

Violation of Lindsey's right to due process requires dismissal with prejudice of the charges against him.

II. THE DISTRICT COURT ERRED IN DENYING LINDSEY'S MOTION TO WITHDRAW HIS GUILTY PLEA AS IT WAS NOT VOLUNARILY MADE.

At any time before or after judgment, the court may, for good cause shown permit the plea of guilty or nolo contendere to be withdrawn and a plea of not guilty substituted. Mont. Code Ann. § 46-16-105(2). "Involuntariness constitutes good cause for withdrawal of a plea under § 46-16-105(2) . . . but other reasons may exist." *State v. Lone Elk,* 2005 MT 56, ¶ 19, 326 Mont. 214, 108 P.3d 500. This Court reviews a district court's denial of a motion to withdraw a guilty plea *de novo*. *State v. Brinson*, 2009 MT 200, ¶ 3, 351 Mont. 136, 210 P.3d 164.

A plea of guilty is constitutionally valid only to the extent it is voluntary and intelligent. In order for a guilty plea to be voluntary, he must be "'fully aware of the direct consequences of the plea, including the value of any commitments made

to him by the court, the prosecutor or his own counsel.'" U*srey*, ¶ 17. *See also*, *Lone Elk*, ¶¶ 13, 21; *Bousley v. United States*, 523 U.S. 614, 618 (1998); *Brady v. United States*, 397 U.S. 742, 755 (1970). A district court's denial of a motion to withdraw a guilty plea will not be overturned if the defendant was aware of the direct consequences of such a plea, and if his plea was not induced by threats, misrepresentation, or an improper promise such as a bribe. *State v. McFarlane*, 2008 MT 18, ¶ 17, 341 Mont. 166, 176 P.3d 1057 (*citing Lone Elk*, ¶ 21; *Brady*, 397 U.S. at 755). The issue is, whether, *at the time* Lindsey entered his guilty plea, he was induced to do so by any of the circumstances contemplated by *Brady* or *Lone Elk*. *Cf. State v. Deserly*, 2008 MT 242, ¶ 18, 344 Mont. 468, 188 P.3d 1057; *Brinson*, ¶ 11. "If there is any doubt that a plea is involuntary, the doubt should be resolved in the defendant's favor." *State v. Schaff*, 1998 MT 104, ¶ 17, 288 Mont. 421, 958 P.2d 682, *overruled on other grounds by Deserly*, ¶ 12.

When determining if a defendant entered a plea voluntarily and whether a district court erred in denying a motion to withdraw a plea, this Court considers the facts of each case. *Usrey*, ¶ 17; *McFarlane*, ¶ 17. These considerations include the adequacy of the district court's interrogation, the benefits obtained from a plea bargain, the withdrawal's timeliness, and other considerations that may affect the credibility of the claims presented. *McFarlane*, ¶ 17 (*citing State v. Muhammad*, 2005 MT 234, ¶¶ 14, 24, 328 Mont. 397, 121 P.3d 521).

The facts of this case lead to the conclusion that Lindsey entered a plea agreement involuntarily. First, Lindsey's motion to withdraw his guilty plea was timely. Second, Lindsey's attorney, Carol Johns (Johns), pressured Lindsey for eighteen months to plead guilty culminating with a five-day campaign which resulted in Lindsey signing the plea agreement. (7/7/09 Tr. at 15:23-16:6, 18:2-7, 18:13-19:4, 21:8-22:17.) Second, although sexual intercourse without consent was dropped, Lindsey did not receive a benefit of the bargain as he pled guilty to sexual assault which provides the same possible punishment. Third, the district court's colloquy was not adequate and did not take into consideration Lindsey's limited level of understanding.

A. Lindsey's Motion to Withdraw His Guilty Plea Was Timely.

Lindsey entered a guilty plea on March 24, 2009. (D.C. Doc. 118.) Prior to sentencing, Lindsey met with an attorney who agreed to represent him and who soon thereafter motioned to withdraw his guilty plea (May 14, 2009). (D.C. Doc. 135.) Lindsey's motion was timely.

B. Lindsey's Counsel Made Misrepresentations About the Sentence He Would Receive.

Misrepresentation may be a basis for an involuntary plea agreement. Lindsey operated under the assumption he was going to get a 10 year suspended sentence. (7/7/09 Tr. at 118.) Johns misled Lindsey to believe if he pled guilty he would get no prison time and get out of jail the next day. (7/7/09 Tr. at 62.) She

made promises she could not fulfill nor guarantee to a person whose comprehension level was that of a fifth grader. At the time of pleading guilty, Lindsey did not understand what "open plea" meant, or that the Court could reject any recommendation made by his lawyer. (7/7/09 Tr. at 61.) Lindsey believed the deal would be ten years, suspended. (7/7/09 Tr. at 62.) At the time of the plea agreement, Lindsey did not know what a mandatory minimum was or that it would apply to him. (7/7/09 Tr. at 61.) Mandatory minimum for the crime he pled guilty to is four years; Lindsey was told he would receive a ten year suspended sentence. (7/7/09 Tr. at 62.) At the time of sentencing Lindsey did not know what the term "waiver" meant. (7/7/09 Tr. at 64.) John's told Lindsey he would lead a "perfectly normal life" after plea (barred from jobs/professions). (7/7/09 Tr. at 69.)

Lindsey was pressured, cajoled and, in effect, induced to believe he had no hope over a period of 18 months, no matter how many times he asked for a trial. (7/7/09 Tr. at 39-40 (testimony by Kathleen Clark), 83-88.) The five days leading up to the change of plea, Johns visited Lindsey and continued to pressure him to plead guilty. At one such meeting Johns' supervisor was present and also stated he would receive a ten year suspended sentence. (7/7/09 Tr. at 21, 71.) Even Lindsey's "foster mother" Kathleen Clark testified that Lindsey was looking forward to going to trial in order to clear himself, but the pressure continued and after he signed the plea agreement, Clark stated she received a phone call from

Johns stating there was "good news." (7/7/09 Tr. at 22.) And that in the five days before the plea agreement was signed, Lindsey's demeanor changed to one of depression and resignation. (7/7/09 Tr. at 22-24.)

C. There Was No Benefit of the Bargain as What Lindsey Pled to Would Equal the Other Crime He Was Charged With, and He Has to Register as a Sexual Offender for Life.

Lindsey did not receive a benefit of the bargain, as both crimes Lindsey was charged with were subject to life imprisonment, up to $50,000 in fines, and lifetime sexual offender registration. *See* Mont. Code Ann. §§ 45-5-502(3), 45-5-503(3)(a). Choosing one over the other for a plea agreement is like comparing apples to apples.

D. The District Court's Colloquy With Lindsey Was Inadequate and Did Not Take Into Consideration His Limited Level of Comprehension.

Lindsey's understanding of his plea includes a review of the adequacy of the district court's interrogation. *State v. Swenson*, 2009 MT 42, ¶ 12, 349 Mont. 268, 203 P.3d 768. The adequacy of the interrogation is at issue here, and although the district court found its interrogation satisfactory, the court's conclusion is wrong. (D.C. Doc. 159, attached as App. D.)

In denying Lindsey's motion to withdraw his plea, the district court referenced Lindsey's letter to the court which stated he knew that if found guilty he would have to register as a sex offender for the rest of his life which supported a

finding of a voluntary plea. (D.C. Doc. 159, *citing* D.C. Doc. 8.) However, Lindsey had no information or any modicum of understanding that registering as a sex offender would have an impact on where he lived, his eligibility for federal programs, whether he could attend school, professions he could do, and other serious consequences to his liberty and freedom, for the rest of his life. (7/7/09 Tr. at 75-76.)

At Lindsey's hearing on the motion to withdraw, the district court interjected itself and asked the defendant whether he messed up in any way:

> The Court: Okay. Then the last series of questions I have[,] have to do with complaints you're making against the Court. I don't take any offense at it. Part of my role here is, if you feel I did something wrong, unlawful, improper, you should let me know. Anything on that guilty plea colloquy, the exchanges, the conversation we had on march 24th when you pled guilty, anything about that that you feel like I imparted false information to you?
>
> Lindsey: What do you mean imparted?
>
> The Court: I told you thinks that were not true? For example, related to the 10-year suspended sentence, do you recall my telling you at the time I wasn't bound by the Plea Agreement, that I could sentence you up to the maximum?
>
> Lindsey: Yeah, but I was informed that you had to offer those, that you had to do that just as a juvenile court so you didn't get an appeal on your record.
>
> The Court: That's what I want to know. Are you complaining about my doing it? Do you think I did it unlawfully, telling you that?

Lindsey: I don't think I'm understanding here.

. . . .

The Court: Well, you might think I told you something or mitted telling you something about that because your attorney suggested that you might not be able to have, if you fathered a child, access to a child - - I'm not certain about that - - that you might not be able to go to schools, or that you might not be able to register for certain occupations.

But as I read Page 23 of the transcript, my words to you, "you are also subject to reasonable employment or occupational prohibitions and restrictions designed to protect the class or classes of persons containing any likely victims of further offenses."

So I just need to know if you think I failed to tell you something that lawfully I was required to tell you at the time you pled guilty.

Lindsey: I guess. I don't know. I'm not sure. I don't - - I didn't understand, until she [Attorney Kauffman] explained to me, what that whole paragraph meant.

The Court: Of course, there's a recent Montana Supreme Court decision that says a different felony conviction situation, a partner or family member assault felony conviction, when a district court judge completely overlooked the Brady Act and didn't tell a person they could be subject to a lifetime prohibition of having weapons, that the Supreme Court said that was collateral to sentencing and that didn't really amount to anything. It wasn't an essential element in informing you at the time. I just make counsel aware of that.

I'm trying to find out if you think I did something wrong versus I'm hearing complaints about Ms. John's

representation of you. Do you think I did something wrong at the time that you pled guilty?

Kauffman: Your Honor, in an effort to protect my client and the process, I don't think that he would be competent to answer that question without any background in legal knowledge or the case law; and if I could respond to that question, I would really ask leave of Court do to that.

The Court: Well, you will have the opportunity to. You'll ask more questions. You'll have a chance to summarize. There will be briefing. I just need to have this conversation with him now.

Lindsey: I guess you didn't do anything wrong.

(7/7/09 Tr. at 113:1-116:10.)

This exchange illustrates the gulf between what the court asks and how Lindsey processes the information. Essentially the district court asked him to not only know what the Judge is supposed to ask him, but in what way the Judge failed to meet these legal requirements of a colloquy.

If Lindsey had difficulty understanding the term "impart" it is easy to understand Lindsey's failure to grasp what happened at the change of plea hearing when the court used such words as: "impairment," "surmise," "Extended Juvenile Jurisdiction Act," "activated," "disclose," "jurisdiction," "pursuing," "versus," "sufficient," "proceed," "designate," "exempts," "adjudicated," "aspect of the potential," and "speculation." (3/24/09 Tr. at 5-10, attached as Appendix C.) The district court uses this type of language for six pages prior to the start of the

colloquy. (3/24/09 Tr. at 10.) The Court is encouraged to read the change of plea colloquy which is attached as Appendix C.

The district court's colloquy was anything but ordinary. After discussing the transfer back hearing and its potential issues, Lindsey's counsel requests the district court to "bring to the attention of" Lindsey the difference in the sex offender registration requirements of adult and youth dispositions because "he needs to be aware of that." (3/24/09 Tr. at 7-8.) Immediately, the district court should have stopped the proceeding.

At the change of plea hearing, the district court engaged in lengthy explanations of the maximum punishment, restitution, waiver of rights, representation by an attorney, lesser included offenses, non-binding nature of a plea agreement (3/24/09 Tr. at 11-18, attached as Appendix C), that did not meet the developmental limitations of Lindsey's comprehension. The district court usually followed these drawn out explanations with the question, "Do you understand?" The district court also discussed the Extended Juvenile Prosecution Act ("EJPA") in length and how it would apply to Lindsey if he was transferred back to youth court.[3] (3/24/09 Tr. at 5-7, attached as Appendix C.) Lindsey

[3] The district court erred in this assumption as the EJPA would not apply to Lindsey and the crimes he was charged with (Sexual Intercourse without Consent, § 45-5-503(3)(a), Sexual Assault, § 45-5-502(3)). The EPJA does not extend to crimes that are punishable by death or life imprisonment or when a sentence of 100 years could be imposed. Mont. Code Ann. § 41-5-1602(1).

acquiesced to everything the district court requested of him because he was told to do so to get out of jail.

Another case specific factor is Lindsey's learning disability, reading level, and comprehension. Lindsey was diagnosed with ADD at 8 or 9 years old (which went untreated between the ages of 15-20). Lindsey never finished the ninth grade; could not read past the third grade; and had a fifth grade level of comprehension. (D.C. Doc. 159; 7/7/09 Tr. at 53-54; 12/1/09 Tr. at 84, 92, 102.) Although the district court found Lindsey competent, was he really? Did Lindsey have the requisite or adequate ability to understand what occurred? When asked by the district court about his prior theft case, Lindsey responded. Then when asked about the victim in this case, Lindsey thought the court was still discussing the theft case and was ultimately confused. (7/7/09 Tr. at 122.)

E. Lindsey's Guilty Plea Was Involuntary and He Should Be Allowed to Withdraw It.

Good cause exists to allow Lindsey to withdraw his guilty plea. Lindsey's attorney, Johns, and her supervisor, misrepresented that he would receive a 10-year suspended sentence and that he would be immediately out of jail upon his guilty plea. Lindsey did not obtain a benefit of the bargain as the possible punishment for sexual assault and sexual intercourse without consent are the same. And lastly, the district court's colloquy was inadequate as Lindsey did not have the level of

comprehension to understand the court's lengthy and confusing explanations of his rights. Lindsey's guilty plea was not voluntarily or intelligently made.

This Court should reverse the denial of Lindsey's motion to withdraw his guilty plea.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO INQUIRE AND RESPOND TO LINDSEY'S REQUEST FOR NEW COUNSEL

A request for substitution of appointed counsel is within the sound discretion of the district court. This Court will not overrule such a ruling absent an abuse of discretion. A district court abuses its discretion if it "acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice." *Robinson v. State*, 2010 MT 108, ¶¶ 11, 24, 356 Mont. 282, 232 P.3d 403 (*citing Hendershot*, ¶ 19).

When reviewing this question for an abuse of discretion, the Court should consider: (1) the timeliness of Lindsey's motion; (2) the adequacy of the district court's inquiry; and (3) the extent of the conflict between the defendant and his counsel. *Smith*, 282 F.3d at 763-64 (*citing United States v. Corona-Garcia*, 210 F.3d 973, 976 (9th Cir. 2000)).

Timeliness: Lindsey sent a letter to the district court on December 27, 2007. The letter requested new counsel as Lindsey had not heard from his attorney since he had been charged, had called several times, but did not speak with her and never

received a phone call or visit in return. The record is silent after the letter was filed with the district court. (D.C. Doc. 8.)

Adequacy of Inquiry: When a defendant alleges ineffective assistance of counsel, the district court must determine if the complaints are substantial by making an *adequate initial inquiry* into the nature of the complaints. *Hendershot*, ¶ 23 (*citing State v. Gallagher*, 1998 MT 70, ¶ 15, 288 Mont. 180, 950 P.2d 1371). Case law supports an inquiry when a party seeks substitute counsel. *Smith*, 282 F.3d at 763-64 (*See e.g., United States v. Musa*, 220 F.3d 1096, 1102 (9th Cir. 2000); *United States v. D'Amore*, 56 F.3d 1202, 1205 (9th Cir. 1995)). *See also*, *Hendershot*, ¶¶ 23-24. Despite this general preference, the failure to conduct a hearing is not by itself an abuse of discretion. *Smith*, 282 F.3d at 763-64 (Acknowledging that district courts are in the best position to consider a party's request for substitute counsel, the courts are only required to "generate a sufficient basis for reaching an informed decision.") (*citing United States v. McClendon*, 782 F.2d 785, 789 (9th Cir. 1986)).

The district court never made an inquiry on Lindsey's request and beyond Lindsey's December 27, 2007 letter, the record contains no reference to Lindsey's request for new counsel. (D.C. Doc. 8.) Although a hearing may have been preferable, under the circumstances of this case the district court *did not even*

provide Lindsey with an "informed decision" regarding his request for new counsel and therefore an abuse of discretion occurred. *See, Smith*, 282 F.3d at 765.

Extent of the Conflict: This Court must analyze counsel Johns' performance and the relationship between Lindsey and his counsel *at the time he requested substitution*. *See Hendershot*, ¶ 27. At the time Lindsey wrote the court, he had been represented by Johns for only fifteen days, however, in that fifteen days, Johns had never visited her client and had not accepted nor returned his calls. It is evident there was no attorney client relationship as Lindsey consistently referred to his attorney as Ms. Johnson (whereas her name is Carol Johns). (D.C. Doc. 8.) Even though only two weeks into representation, the district court failed to even perform the slightest inquiry as to Lindsey's letter and make it part of the record.

The full extent of the conflict between Lindsey and his attorney Johns is unknown as the district court failed to even consider Lindsey's request for new counsel. At the hearing to withdraw his guilty plea, Lindsey raised the event/issue that he had wanted a different attorney from the beginning, had requested one from the court, but that he felt stuck with Johns because he could not afford to hire one. (7/7/09 Tr. at 52, 100.) The district court's failure to examine Lindsey's request or make ANY sort of inquiry confirmed his belief that he thought he was stuck. It cannot be said that the district court didn't know about the request for new counsel

because Lindsey sent the letter directly to the judge and the district court used the letter to support its decision denying the motion to withdraw his plea agreement. (D.C. Doc. 159 at 3.)

The district court abused its discretion in failing to inquire about Lindsey's request for counsel, and not even making a record that a decision had been made regarding the request for new counsel was a serious abuse of discretion. The district court failed in any manner to recognize the main thrust of the letter: request for new counsel ("I would like a new appointed attorny [sic]. . ."). (D.C. Doc. 8.)

IV. LINDSEY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FROM CAROL JOHNS AS THERE IS NO PLAUSIBLE REASON SHE DID NOT FILE A MOTION TO DISMISS FOR THE DISTRICT COURT'S FAILURE TO HAVE A TIMELY TRANSFER BACK HEARING.

A defendant's right to effective assistance of counsel exists in order to give true meaning to the right to a fair trial. *City of Billings v. Smith*, 281 Mont. 133, 136, 932 P.2d 1058, 1060 (1997). The right to effective assistance of counsel is protected by the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution. The right to counsel is fundamental and applies with equal force to all persons, regardless of their ability to compensate an attorney. *State v. Enright*, 233 Mont. 225, 228, 758 P.2d 779, 781 (1988) (*citing Gideon v. Wainwright*, 372 U.S. 335 (1963)).

A criminal defendant is denied effective assistance of counsel if: (1) his counsel's conduct falls short of the range reasonably demanded in light of the Sixth Amendment to the United States Constitution; and (2) counsel's failure is prejudicial. *State v. Rose*, 1998 MT 342, ¶ 12, 292 Mont. 350, 972 P.2d 321; *Strickland v. Washington*, 466 U.S. 668 (1984). In other words, to prevail on such a claim, a defendant must show his counsel's performance was deficient and the deficient performance prejudiced him. *Hardin v. State*, 2006 MT 272, ¶ 18, 334 Mont. 204, 146 P.3d. 746 (citing *Hans v. State*, 283 Mont. 379, 391-93, 942 P.2d 674, 681-82 (1997)).

The Montana Supreme Court distinguishes between record-based and non-record-based claims of ineffective assistance of counsel. *State v. Bateman*, 2004 MT 281, ¶ 23, 323 Mont. 280, 99 P.3d 656. Generally, this Court asks "why" counsel did or did not perform as alleged, and then this Court seeks to answer the question by reference to the record. *State v. White*, 2001 MT 149, ¶ 20, 306 Mont. 58, 30 P.3d 340. Claims of ineffective assistance of counsel based on counsel's conduct for which "no plausible justification" exists are considered record-based claims. *State v. Kougl*, 2004 MT 243, ¶ 19, 323 Mont. 6, 97 P.3d 1095; *Hagen v. State*, 1999 MT 8, ¶¶ 19-20, 293 Mont. 60, 973 P.2d 233; *Petition of Hans*, 1998 MT 7, ¶¶ 28, 42, 288 Mont. 168, 958 P.2d 1175). This Court will not hold an attorney's actions ineffective if those actions were tactical. In order for counsel's

actions to constitute ineffective assistance, those actions must stem from *neglect or ignorance*, rather than informed, professional deliberation. *Gonzales*, 278 Mont. at 532, 926 P.2d at 710.

Carol Johns, provided ineffective assistance of counsel throughout her representation of Lindsey. Not only did she fail to communicate with her client in the early stages of this case which resulted in Lindsey writing a letter to the court requesting new counsel; but her neglect and ignorance in regards to Youth Court Act law was evident throughout the case. After the district court failed to conduct a transfer back hearing within the required time period, Johns failed to motion the court for dismissal for a due process violation. There is no plausible justification for this as Johns did not waive the hearing and further requested a continuance in order to prepare for the hearing. Johns' ignorance of the Youth Court Act is evident. If she had read the statutes, she would have *known* a transfer hearing was required. When the district court had not held the hearing within the required time, Johns should have motioned to dismiss the charges based on a violation of due process. She did not do this. If the motion would have failed, Johns then would have at least brought to the attention of the court (a year earlier) that a transfer back hearing was required and this would have provided Lindsey a better opportunity to avail himself of the rehabilitation possibilities with the Youth Court.

Johns' failure to educate Lindsey as to his rights and the differences between registering as an adult or youth sexual offender is another example of her ignorance and neglect of statutory law. After discussing the transfer back hearing and its potential issues, Johns stated to the district court, "I believe that Mr. Lindsey understands the distinction between the youth court and adult court." (3/24/09 Tr. at 4.) Yet, three pages later, Johns' requests the district court to "bring to the attention of" Lindsey the difference in the sex offender registration requirements of adult and youth dispositions because "he needs to be aware of that." (3/24/09 Tr. at 7-8.) This is record based evidence showing Johns' ignorance and neglect in her representation of Lindsey and the district court should have immediately stopped the proceeding.

This court should remand for appointment of new counsel for Lindsey.

CONCLUSION

Lindsey's right to due process was violated and the charges against him should be dismissed with prejudice.

In the alternative, Lindsey's guilty plea was involuntary and the district court's denial should be reversed.

The district court abused its discretion when it failed to inquire into Lindsey's request for new counsel.

And finally, Johns provided ineffective assistance of counsel by failing to motion to dismiss the case for the district court's failure to hold a timely transfer back hearing. Lindsey should receive appointment of new counsel.

Respectfully submitted this ____ day of July, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

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APPENDIX